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10 Attorneys for Defendants
11 NUANCE COMMUNICATIONS, INC.,
12 PAUL RICCI
13 JEANNE NAUMAN
14 CATHERINE DORCHUCK
15 DIANE COFFEY
16 MATTHEW LIPTAK
17 JOHN HAGEN and
18 RICHARD NARDONE

19
20 UNITED STATES DISTRICT COURT
21
22 NORTHERN DISTRICT OF CALIFORNIA

23 KRISHNA REDDY,

24 Plaintiff,

25 vs.

26 NUANCE COMMUNICATIONS, INC.;
27 FOCUS INFOMATICS, INC.; PAUL
28 RICCI; JEANNE NAUMAN; CATHERINE
DORCHUCK; RICHARD NARDONE;
JOHN HAGEN; MATTHEW LIPTAK;
DIANE COFFEY; and DOES 1 through 100,
inclusive, with the individual named
defendants being sued both individually and
also as the agents of the defendants FOCUS
INFOMATICS, INC. and NUANCE
COMMUNICATIONS, INC.

Defendants.

) **CASE NO. CV 11-05632(PSG)**

) **NOTICE OF MOTION AND
MOTION TO SET ASIDE
DEFAULT;**

) **MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT THEREOF [FRCP
55(c)];**

) **DECLARATION OF JOSHUA
B. WAGNER**

Date: April 24, 2012
Time: 10:00 a.m.

Gordon & Rees LLP
275 Battery Street, Suite 2000
San Francisco, CA 94111

1 **TO PLAINTIFF KRISHNA REDDY PROCEEDING *PRO SE*:**

2 **PLEASE TAKE NOTICE** that on April 24, 2012 at 10:00 a.m., or as soon
 3 thereafter as this matter may be heard in the Courtroom of the Honorable Paul S.
 4 Grewal of the United States District Court for the Northern District of California,
 5 located at 280 South 1st Street, Courtroom 5, 4th Floor, San Jose, CA 95113, the
 6 Honorable Magistrate Judge Paul Singh Grewal presiding, Defendants, PAUL
 7 RICCI; JEANNE NAUMAN; CATHERINE DORCHUCK; DIANE COFFEY,
 8 MATTHEW LIPTAK, JOHN HAGEN and RICHARD NARDONE (hereinafter
 9 referred to as the “Individual Defendants”) hereby move the Court for an order
 10 setting aside the Default entered by the Clerk on February 9, 2012.

11 Pursuant to Rule 55(c) of the Federal Rules of Civil Procedure, good cause
 12 exists to grant the relief sought as the default was entered based on improper
 13 service of process. Further good cause exists as due to the improper service,
 14 Plaintiff has not successfully invoked personal jurisdiction as to these Individual
 15 Defendants. Further, there will be no prejudice to Plaintiff if the relief is granted,
 16 and the Individual Defendants have good and meritorious defenses to the alleged
 17 claims for relief.

18 This Motion will be based on this Notice, the accompanying Memorandum
 19 of Points and Authorities, the records and pleadings on file in this action, and upon
 20 such further evidence, either oral or documentary, as this Court will consider at the
 21 hearing on this Motion.

22 Defendants request oral argument at the motion hearing.

23 Dated: March 7, 2012

GORDON & REES LLP

24 By: /s/ Joshua B. Wagner

25 Michael Laurenson

26 Joshua B. Wagner

27 Attorneys for Defendants

28 Nuance Communications, Inc. Paul Ricci,
 Jeanne Nauman, Catherine Dorchuck, Diane
 Coffey, Matthew Liptak, John Hagen And
 Richard Nardone

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants Paul Ricci; Jeanne Nauman; Catherine Dorchuck; Diane Coffey, Matthew Liptak, John Hagen and Richard Nardone (hereinafter referred to as "Individual Defendants") respectfully request that this Court set aside the Clerk's entry of Default filed on February 9, 2012. Good cause exists as default was entered based on Plaintiff's improper attempt to effectuate service against Defendants. Plaintiff has not effected service sufficient to establish personal jurisdiction over Defendants. Further, no prejudice will result to Plaintiff as this is early in the action, and Defendants have good and meritorious defenses to the claims for relief.

II. RELEVANT FACTS

On November 21, 2011, Plaintiff Krishna Reddy ("Plaintiff"), proceeding in *pro se*, filed suit against her former employer, Nuance Communications, Inc., and Defendants, alleging: (1) Discriminatory Employment Practices, Harassment and Hostile Working Environment; (2) Tortious Wrongful Termination in Violation of Public Policy; (3) Breach of Contract; (4) Breach of the Covenant of Good Faith and Fair Dealing; (5) Promissory Estoppel; (6) Fraud, Deceit, and Civil Conspiracy; (7) Intentional and Negligent Interference with Contract and Prospective Economic Advantage; (8) Violation of California Labor Code Section 1050 and 1052; (9) Intentional and Negligent Infliction of Emotional Distress; and (10) Unconstitutional Off-shoring of Confidential Medical Information of the Citizens of the United States. In addition to injunctive relief, Plaintiff's prayer seeks thirty-one billion dollars in compensatory and punitive damages.

According to Plaintiff, her attempted service on the Defendants was made by leaving a copy of the summons and Complaint with Ms. Nancy Newark, Legal Counsel – Employment, at Nuance Communications, Inc., at 1 Wayside Road, Burlington, Massachusetts 01803 and sending a duplicate copy of the summons

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1 and Complaint via certified mail to that address. See Docket No.: 25; Declaration
 2 of Krishna Reddy in Support of Request to Enter Default (“Reddy Decl.”), ¶ 5;
 3 Also see Docket 26-34.)

4 On January 5, 2012, Plaintiff advised counsel for Nuance and Defendants
 5 that she had accomplished service on December 30, 2012. (Declaration of Joshua
 6 B. Wagner (“Wagner Decl.”, ¶ 2; Exhibit 1.) That same date, counsel for
 7 Defendants requested that Plaintiff provide the proof of service. (Wagner Decl., ¶
 8 3; Exhibit 2.) The following day, counsel for Defendants was able to review the
 9 documents that Plaintiff indicated constituted service, and determined that service
 10 had not been validly accomplished. (Wagner Decl., ¶ 4; Exhibit 3.) On January 6,
 11 2012, counsel for Defendants sent a courtesy email to Plaintiff advising her of the
 12 defective service. (Wagner Decl., ¶ 5; Exhibit 4.)

13 On February 3, 2012, Plaintiff filed the proofs of service with respect to
 14 Defendants. (See Docket Nos.: 26-34.) That same day, Plaintiff filed a Request
 15 with the Clerk to Enter Default against Defendants (Docket No.: 25.) Notably, the
 16 Request for Entry of Default filed with the Clerk stated that each of the Defendants
 17 had been served with summons, and that the time allowed by law for responding
 18 had expired; and that each Defendant had failed to file a pleading or motion
 19 permitted by law; and that none of the Defendants were minors or incompetent.
 20 (Reddy Decl: ¶¶ 3-9.) On February 9, 2012, the Court Clerk entered default as to
 21 all Defendants, except Ms. Coffey. (Docket No.: 37.)

22 On February 14, 2012, Defendants filed an Objection as to the defective
 23 service of process and corresponding lack of jurisdiction with the Court. (Docket
 24 No.: 39.) Defendants objection was predicated on (1) use of substitute service
 25 without any attempt at personal service; and (2) the mailing to a Massachusetts
 26 address which in no way could be construed as any Defendants usual place of
 27 business.

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1 In response, on February 22, 2012, Plaintiff filed a Reply to Defendants
 2 Objection. (Docket No.: 50.) Notably, Plaintiff conceded that no attempt at
 3 personal service was made, and instead argued that service by mail was adequate.

4 **III. CLERK'S ENTRY OF DEFAULT SHOULD BE SET ASIDE AS**
 5 **PLAINTIFF HAS NOT PROPERLY SERVED DEFENDANTS**

6 A trial court has broad discretion and significant procedural flexibility to set
 7 aside a clerk's entry of default. *Brady v. United States*, 211 F. 3d 499, 504 (Ninth
 8 Cir. 2000) ("court's discretion is especially broad when...it is entry of default that
 9 is being set aside rather than default judgment."). Rule 55(c) provides that a Court
 10 may set aside an entry of default for "good cause" shown. Fed. R. Civ. Proc.
 11 55(c). Here, good cause exists (1) as the default was entered based on improper
 12 service of process; as Plaintiff has not successfully invoked personal jurisdiction as
 13 to Defendants. Further, there will be no prejudice to Plaintiff if the relief is
 14 granted, and Defendants have good and meritorious defenses to the alleged claims
 15 for relief.

16 A motion for relief from default may be granted where defendant (even if he
 17 or she had actual notice) demonstrates defects in the service of process. *Carimi v.*
 18 *Royal Caribbean Cruise Line, Inc.*, 959 F. 2d 1344, 1345 (5th Cir. 1992); see *SEC*
 19 *v. Internet Solutions for Business Inc.*, 509 F. 3d 1161, 1165-1166 (9th Cir. 2007).
 20 Plaintiff, as the party invoking the court's jurisdiction, has the burden of proving
 21 the existence of personal jurisdiction in opposition to defendant's motion to set
 22 aside a default judgment. *Thomas P. Gonzalez Corp. v. Consejo Nacional De*
 23 *Produccion De Costa Rica*, 614 F. 2d 1247, 1256 (9th Cir. 1980). This is so
 24 because an *in personam* judgment entered without personal jurisdiction over a
 25 defendant is void as to that defendant." *Oldfield v. Pueblo De Bahia Lora, S.A.*,
 26 558 F. 3d 1210, 1217 (11th Cir. 2009); *Combs v. Nick Garin Trucking*, 825 F. 2d
 27 437, 442 (DC Cir. 1987).

28 **A. Plaintiff's Has Not Satisfied Federal Requirements for Service**

1 A federal court does not have jurisdiction over a defendant unless the
 2 defendant has been served properly [with the summons and complaint] under
 3 Federal Rule of Civil Procedure rule 4. Without substantial compliance with Rule
 4 'neither actual notice nor simply naming the defendant in the complaint will
 5 provide personal jurisdiction.' *Direct Mail Specialists, Inc. v. Eclat Computerized*
 6 *Technologies*, 840 F.2d 685, 687 (9th Cir. 1988) (citing *Benny v. Pipes*, 799 F.2d
 7 489, 492 (9th Cir. 1986), cert. denied, 484 U.S. 870, 108 S. Ct. 198, 98 L. Ed. 2d
 8 149 (1987)).

9 Rules 4(d) and (e) provide that service of process of the summons and
 10 complaint may be made: (1) by mailing a copy of the summons and complaint to
 11 the individual defendant with a notice and request for waiver; (2) pursuant to state
 12 law; (3) by delivering a copy of the summons and complaint to the individual
 13 defendant personally; (4) by leaving a copy of the summons and complaint at the
 14 individual defendant's dwelling house or usual place of abode with some person of
 15 suitable age and discretion then residing therein; or (5) by delivering a copy of the
 16 summons and complaint to an agent authorized by appointment or by law to
 17 receive service of process.

18 According to Plaintiff, she attempted service under California law pursuant
 19 to Federal Rule of Civil Procedure Rule 4(e)(1). (See Docket No. 50: Reply to
 20 Objection, p.4:9-12.) However, this appears to be a misstatement as Rule 4(e)(1),
 21 does not authorize service under California law, but instead requires that a party
 22 attempting service mail a copy of the summons and complaint to the individual
 23 defendant with a notice and request for waiver. Although presumably Plaintiff will
 24 argue that she did mail a copy of the summons and complaint, it cannot be disputed
 25 that Plaintiff failed to include a request for waiver as required by Rule 4(e)(1).
 26 Accordingly, service was not accomplished as per Rule 4(e)(1).

27 ///
 28 ///

1 **B. Plaintiff's Has Not Satisfied California Requirements for**
 2 **Accomplishing Service.**

3 Given Plaintiff's reference to California law, it is more likely that she
 4 intended to accomplish service under Rule 4(e)(2), pursuant to state law, in this
 5 case California law. This is borne out by Plaintiff reference to the California Code
 6 of Civil Procedure. (See Docket No. 50: Reply to Objection p.4: 23-27.) Plaintiff
 7 invokes California Code of Civil Procedure sections 415.20 and 415.40.

8 As a threshold matter, under California law, Plaintiff has an obligation to
 9 exercise diligence in determining each Individual Defendants' status and address.
 10 *Kott v. Superior Court*, 45 Cal. App. 4th 1126, 1131-1133 (1996). Here, Plaintiff
 11 has not shown that she has made any efforts to locate the Individual Defendants,
 12 has not determined whether they are current or former employees of Nuance, and
 13 simply blindly attempted service by delivery and mailing to an address in
 14 Burlington, Massachusetts, a location with no apparent connection to any of the
 15 Individual Defendants, or the facts in this action, except that it is the corporate
 16 headquarters of Plaintiff's former employer.

17 1. Service Ineffective Under California Civil Procedure § 415.20

18 Under California Code of Civil Procedure section 415.20, substituted service
 19 may be made in California by leaving a copy of the summons and complaint at the
 20 individual defendant's office, dwelling house, usual place of abode, usual place of
 21 business, or usual mailing address other than a United States Postal Service post
 22 office box." However, Plaintiff has introduced no evidence that the address of
 23 Nuance's offices in Burlington, Massachusetts is any Individual Defendants
 24 "usual" place of abode, business, or mailing address. Accordingly, Plaintiff's
 25 efforts under 415.20 necessarily fail. See *Bonita Packing Co. v. O'Sullivan*, 165
 26 F.R.D. 610, 613 (C.D. Cal. 1995); *Blundell v. County of L.A.*, 2009 U.S. Dist.
 27 LEXIS 71918, 9–12 (C.D. Cal. Aug 12, 2009).

1 Second, California law under section 415.20 requires that a Plaintiff exercise
 2 due diligence in attempting personal service prior to resorting to substitute service.
 3 All means other than personal delivery to the defendant are considered substituted
 4 service, and personal service must have been diligently attempted before
 5 substituted service may be performed. “Ordinarily, . . . two or three attempts at
 6 personal service at a proper place should fully satisfy the requirement of
 7 reasonable diligence and allow substituted service to be made.” *Bein v. Brechtel-*
 8 *Jochim Group, Inc.*, 6 Cal. App. 4th 1387, 1390 (1992) (citing *Espindola v. Nunez*,
 9 199 Cal. App. 3d 1389, 1392, (1988). As noted above, Plaintiff has deliberately
 10 avoided undertaking any efforts to attempt personal service. Accordingly, service
 11 under section 415.20 fails.

12 2. Service Ineffective Under California Civil Procedure § 415.40

13 Under Code of Civil Procedure section 415.40, California allows for service
 14 on out-of-state residents by certified mail with return receipt requested. As a
 15 threshold matter, Plaintiff simply assumes the Individual Defendants are out-of-
 16 state residents, and are thus able to be served pursuant to 415.40. (See Docket No.
 17 50: Reply to Objection, p.4: 22.) Absent evidence that these Individual Defendants
 18 are out-of-state residents, Plaintiff can not effectuate service under section 415.40.

19 Second, and even more fatal to Plaintiff’s contention, service under section
 20 415.40 is not satisfactory to establish jurisdiction over an out-of-state resident.
 21 Jurisdiction must already be established pursuant to California’s long arm statute
 22 showing that the party to be served has sufficient minimum contacts with
 23 California. *See Cal. Code Civ. Proc* § 410.10; *Rocklin De Mexico, S. A. v.*
 24 *Superior Court*, 157 Cal. App. 3d 91 (Cal.App.3d Dist. 1984). Personal
 25 jurisdiction over a corporation does not automatically establish personal
 26 jurisdiction over its officers, directors, agents and employees. Each defendant’s
 27 “contacts” with the forum state must be evaluated separately. *Calder v. Jones*, 465
 28 U.S. 783, 790 (1984); *Mihlon v. Sup.Ct. (Murkey)*, 169 Cal.App.3d 703, 713

1 (1985). Notably, Plaintiff cannot show that the Individual Defendants have any
 2 connection to California, and for that reason, service under 415.40 fails.

3 **IV. CONCLUSION**

4 Plaintiff has a duty to diligently attempt to locate and serve the individuals
 5 who she has alleged claims against. See Fed. R. Civ. P. 4(c); also see *Kott v.*
 6 *Superior Court*, 45 Cal. App. 4th 1126, 1131-1133 (1996). It is also Plaintiff's
 7 burden to show that service is effective. *Thomas P. Gonzalez Corp. v. Consejo*
 8 *Nacional De Produccion De Costa Rica*, 614 F. 2d 1247, 1256 (9th Cir. 1980).
 9 Here, Plaintiff has failed to make any effort to locate or serve, and cannot show
 10 that service is effective and accordingly, Defendants respectfully request that this
 11 Court set aside the clerk's entry of default.

12 Dated: March 7, 2012

GORDON & REES LLP

14 By: /s/ Joshua B. Wagner
 15 Michael Laurenson
 16 Joshua B. Wagner
 17 Attorneys for Defendants
 18 Nuance Communications, Inc., Paul
 Ricci, Catherine Dorchuck, Diane
 Coffey, Jeanne Nauman, John Hagen,
 Matthew Liptak and Richard Nardone

Gordon & Rees LLP
 275 Battery Street, Suite 2000
 San Francisco, CA 94111

28

1 **DECLARATION OF JOSHUA B. WAGNER**

2 I, JOSHUA B. WAGNER, do hereby declare as follows:

3 1. I am an attorney at law duly admitted and licensed to practice in the United
4 States District Court for Northern District of California. I am a partner with
5 Gordon & Rees LLP, 633 West Fifth Street, Los Angeles, California 90071,
6 attorneys of record for Defendants Paul Ricci; Jeanne Nauman; Catherine
7 Dorchuck; Diane Coffey, Matthew Liptak, John Hagen and Richard Nardone
8 (hereinafter referred to as "Defendants") in the above-captioned matter. I have
9 personal knowledge of the matters stated herein and, if called as a witness, I could
10 and would testify competently thereto. I submit this declaration in Support of
11 Defendants Motion to Set Aside the Clerk's Entry of Default.

12 2. On January 5, 2012, by email, Plaintiff advised my office that she had
13 accomplished service on Defendants on December 30, 2012. Attached as Exhibit 1
14 is a true and correct copy of Plaintiff's January 5, 2012 email correspondence.

15 3. On January 5, 2012, by email, my office requested that Plaintiff provide the
16 proof of service. Attached as Exhibit 2 is a true and correct copy of that January 5,
17 2012 email correspondence.

18 4. On January 6, 2012, my office reviewed the documents that Plaintiff
19 indicated constituted service, and determined that service had not been validly
20 accomplished under either Federal or California requirements.

21 ///

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5. On January 6, 2012, my office sent a courtesy email to Plaintiff advising her of the defective service. Attached as Exhibit 3 is a true and correct copy of that January 6, 2012 email correspondence.

I declare under penalty of perjury under the laws of the United States of America and the laws of the state of California that the foregoing is true and correct and that this declaration was executed at Los Angeles, California this 7th day of March, 2012.

/S/ Josh Wagner

JOSHUA B. WAGNER

Gordon & Rees LLP
275 Battery Street, Suite 2000
San Francisco, CA 94111

EXHIBIT “1”

Sat Sang Khalsa

From: K. Reddy [acaliforniannuance@gmail.com]
Sent: Thursday, January 05, 2012 2:10 PM
To: Sat Sang Khalsa
Cc: K. Reddy
Subject: Service of Summons and Complaint

Mr. Khalsa,

I noticed a new e-mail from you, but while I was trying to open the attachments you sent, I lost the e-mail; it got deleted. Could you please re-send it? Thank you in advance!

Looked like the e-mail was about "waiver of summons."

As you recall, you called me on 11/23/2011 about the lawsuit and regarding waiver of summons. When inquired about service on Focus Infomatics and the remaining individual defendants, you said you'd get back to me regarding that.

On 12/1/2011, in your e-mail, you said that you were looking into whether you could accept service on behalf of the remaining defendants, but you never got back to me.

On 12/12/2011, I wrote to you regarding "acknowledgment of service", and you said you'd get back to me the next day. But, you never did.

I called your office around 12/23/2011, but could not get hold of you. You never got back to me regarding any acknowledgment of service or process either.

I waited for a total of 37 days to hear from you about acknowledgment of service or process, but never received any response from you.

I was told that the summons and Complaint have been served on all the defendants on 12/30/2011.

It is my understanding that at this point, the issue of "waiver of summons" is moot.

Sincerely,

Krishna Reddy
(760) 962-9959

EXHIBIT “2”

Sat Sang Khalsa

From: Sat Sang Khalsa [skhalsa@gordonrees.com]
Sent: Thursday, January 05, 2012 2:33 PM
To: K. Reddy
Cc: Joshua Wagner; SPTBC-1061948.LEGAL@worksite.gordonrees.com
Subject: RE: Service of Summons and Complaint

Dear Ms. Reddy:

It's a surprise that you managed to permanently delete the message, since most email programs, including gmail, have an undelete feature. Nonetheless, I will resend the email message.

As you will see from the message, there is a further step required to effect a waiver of service, which under FRCP Rule 4 is the Plaintiff's obligation. Since some time has passed since we spoke, and you had yet to send the request for waiver form. As a courtesy, and recognizing your pro se status, we provided you with the appropriate format for the request.

From the outset, I have been clear with you that our firm is presently only representing Defendant Nuance and as per FRCP Rule 4 we are willing to waive service on Nuance's behalf. I have been looking into the status of the other defendants. Also, as to your inability to reach me, as you are aware, we recently concluded a stretch of holidays. I'm sure when you called my office of December 23, you must have listened to the voice messages stating that I was out until December 27. If you had left a message or sent an email, that would have been more effective.

In any case, if you have effectuated service, I would appreciate your providing a copy of the proof of service. Feel free to call if you have any questions.

Regards,

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San Francisco * San Diego * Los Angeles * Sacramento * Orange County * Las Vegas * Portland * Seattle * Houston * Chicago * Phoenix * Dallas * New York * Long Island * Florham Park * Denver * Miami * Atlanta * Austin * Hartford

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GORDON & REES LLP
<http://www.gordonrees.com>

EXHIBIT “3”

Sat Sang Khalsa

From: Sat Sang Khalsa [skhalsa@gordonrees.com]
Sent: Friday, January 06, 2012 10:35 AM
To: K. Reddy
Cc: Joshua Wagner; SPTBC-1061948.LEGAL@worksites.gordonrees.com
Subject: RE: Service of Summons and Complaint

Dear Ms. Reddy:

I understand that you have attempted to serve the various Defendants by sending a copy of the Complaint and Summons by certified mail. Unfortunately, under both FRCP rule 4 and the applicable California law that is not a valid manner of effecting service. (See LSJ Inv. Co., Inc. v. O.L.D., Inc. (6th Cir. 1999) 167 F.3d 320, 322-323; Cal. Code. Civ. Pro. §§ 415.10, 415.20, 415.30.)

We remain agreeable to accepting a waiver of service on behalf of Defendant Nuance Communications. At your preference, you are welcome to prepare a Notice of Lawsuit and Request for Waiver of Service of Summons which we will accept on behalf of Nuance.

Also, I am still looking into whether our firm will represent the other named defendants, and will advise you once that issue is clarified.

Regards,

Sat Sang Khalsa

From: Sat Sang Khalsa [mailto:skhalsa@gordonrees.com]
Sent: Thursday, January 05, 2012 2:33 PM
To: K. Reddy
Cc: Joshua Wagner; SPTBC-1061948.LEGAL@worksites.gordonrees.com
Subject: RE: Service of Summons and Complaint

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From the outset, I have been clear with you that our firm is presently only representing Defendant Nuance and as per FRCP Rule 4 we are willing to waive service on Nuance's behalf. I have been looking into the status of the other defendants. Also, as to your inability to reach me, as you are aware, we recently concluded a stretch of holidays. I'm sure when you called my office of December 23, you must have listened to the voice messages stating that I was out until December 27. If you had left a message or sent an email, that would have been more effective.

In any case, if you have effectuated service, I would appreciate your providing a copy of the proof of service. Feel free to call if you have any questions.

Regards,

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To: Sat Sang Khalsa
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On 12/12/2011, I wrote to you regarding "acknowledgment of service", and you said you'd get back to me the next day. But, you never did.

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Sincerely,

Krishna Reddy
(760) 962-9959

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